Paper No. 9
1/31/01 RFC

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Franco Manufacturing Co., Inc.

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Serial No. 75/558,518

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Anthony F. LoCicero of Amster, Rothstein & Ebenstein for Franco Manufacturing Co., Inc.

James R. Cady, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

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Before Cissel, Quinn and Chapman, Administrative Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On September 24, 1996, applicant filed the above-referenced application to register the mark "COMPLIMENTS" on the Principal Register for "bath products, namely, bath towels, hand towels and fingertip towels," in Class 24. The application is based on applicant's assertion that it possesses a bona fide intention to use the mark on these goods in commerce.

The Examining Attorney refused registration under Section 2(d) of the Lanham Act on the ground that if applicant's mark were to be used on the products identified in the application, it would so resemble the mark "COMPLIMENTS," which is registered[1] for "retail store services dealing with home and office furnishings and accessories and personal accessories," in Class 42, that confusion would be likely.

Applicant responded to the refusal of registration with arguments that confusion would not be likely. Applicant claimed that it has priority based on its prior use and federal registrations of the mark "KITCHEN COMPLIMENTS" for, inter alia, kitchen towels, dish cloths, fabric place mats and plastic place mats. (Reg. Nos. 1,098,841 and 1,100,871, both issued in August of 1978 and both timely renewed). Additionally, applicant argued that confusion would not be likely because the goods set forth in the application and services recited in the registration are different.

The Examining Attorney was not persuaded by applicant's arguments, and the refusal to register was made

[1] Reg. No. 1,640, 023, which issued on April 2, 1991 to Port Enterprises, Inc. on the Principal Register. A combined affidavit under Sections 8 and 15 was accepted and acknowledged.

final with the second Office Action. Submitted in support of the refusal to register were copies of a number of third-party registrations wherein the goods and services specified include both towels and retail store services in the field of home furnishings and accessories. Other enclosed registrations demonstrate that towels are products within the category of "home furnishings."

Applicant timely filed a Notice of Appeal. Both applicant and the Examining Attorney filed briefs, but applicant did not request an oral hearing before the Board.

Our primary reviewing court set out the principal factors to be considered in resolving the issue of likelihood of confusion in In re E. I. duPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Chief among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression, and the similarity of the goods or services in question. If the marks are identical, the relationship between the goods are services sold under them need not be as close to support a finding that confusion is likely as would be the case if there were differences between the marks. Amcor, Inc. v. Amcor Industries, Inc., 210 USPQ 70 (TTAB 1981). When the marks are the same, it is only necessary to show that there is a viable relationship between the goods and

services in order to support holding that confusion is likely. In re Concordia International Forwarding Corp., 222 USPQ 355 (PTA be 1983). Any doubt as to the existence of a likelihood of confusion must be resolved in favor of the registrant. Lone Star Manufacturing Co. v Bill Beasley, Inc., 498 F.2d 906, 182 USPQ 368 (CCPA 1974).

In the case now before us, the marks in question are the same, so the Examining Attorney needed only to establish that the goods set forth in the application are related to the services specified in the cited registration in such a way that use of these identical marks in connection with both would be mistakenly assumed to indicate that one source is responsible for both.

That burden has clearly been met. The third-party registration information made of record by the Examining Attorney demonstrates that consumers would have a basis for assuming that the use of the same mark in connection with retail store services in the field of home furnishings and accessories, on one hand, and bath products, namely bath towels, and towels and fingertip towels, on the other, indicates a common source for both. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). The Examining Attorney has established that the goods set forth in the application are of a type that would be offered as part of

the retail store services specified in the cited registration. Clearly, the use of the identical mark in connection with both would be likely to cause confusion as to the source of the goods and services.

Applicant's argument with respect to its prior use and registrations of "KITCHEN COMPLIMENTS" for different, but arguably related, products is not well taken. As noted above, applicant claims that the cited registration is not a proper basis for refusal of registration because applicant has established priority over the registrant based on applicant's "KITCHEN COMPLIMENTS" registrations for place mats and kitchen towels. As the Examining Attorney points out, however, this argument is inappropriate for several reasons. To begin with, in view of the valid and subsisting registration cited against applicant, priority is simply not an issue. Moreover, the prior registrations asserted by applicant are not for the same mark which it seeks to register here, nor are the goods listed in the registrations the same as the goods specified in the instant application. Even if the goods were the same as those in applicant's prior registrations, this argument with regard to priority would still not be available to applicant. If applicant believed that it possesses priority and that the cited registration should

have been denied based likelihood of confusion with the mark in applicant's registrations, applicant could have filed a petition to cancel the cited registration, but the collateral attack applicant makes by asserting priority here in this ex parte appeal is not permitted. In re Dixie Restaurants, 105 F.3rd 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). The cited registration is entitled to the presumption of validity assured by Section 7 of the Lanham Act.

In summary, because the marks are identical and the goods specified in the application are of the type that would be provided as part of the retail store services set forth in the cited registration, and because this record shows that other entities both render retail store services like those of the registrant and sell goods like those of the applicant under the same marks, confusion would be likely with the registered mark for retail home furnishing store services if applicant were to use the same mark in connection with the bath products listed in the application.

Decision: The refusal to register is affirmed.